IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL REVISION APPLICATION NO.11 OF 2007

Mr. Prakash Vernekar
major, married, businessman,
s/o Shri Balkrishna Verenkar,
r/o Bicholim, Goa. Applicant

V e r s u s

1. State of Goa, through Public
Public Prosecutor, High Court,
Altinho, Goa.

2. Mrs. Stella D'Souza,
major, r/o Altinho Apartments,
E-Block, Altinho, Mapusa, Goa. Respondents

Mr. S. D. Lotlikar, Senior Advocate with Mr. Marvin D'Souza, Advocate for the Applicant.

Ms. Winnie Coutinho, Public Prosecutor for the Respondent No.1.

Mr. Nitin Sardessai, Advocate for Respondent no.2.

CORAM: N. A. BRITTO, J.

DATE: 14th June, 2007

ORAL JUDGMENT

The challenge in this revision petition is to the Order dated 27.10.2006, by which the learned Additional Sessions Judge, Panaji, has ordered the gold pieces, of different weights, (MO.7 to 14) which were seized from the possession of the petitioner, a goldsmith, to be returned to respondent no.2, the first informant in criminal case no.205/1996/C.

2. Some facts are required to be stated to dispose of this revision petition.

3. A theft took place in the house of the respondent no.2 on

13.7.1995, and the accused Felix Fernandes was prosecuted under Sections 457 and 380 I.P.C.,1860, and was convicted and sentenced by judgment dated 8.1.2001 of the Learned J.M.F.C., Mapusa and the gold articles including Mo. 7 to 14 were ordered to be released to said first informant i.e. to respondent no.2. The judgment of conviction and sentence has attained finality but the petitioner preferred an appeal to the Court of Sessions against that part of the order by which the gold articles were ordered to be returned to the first informant/Respondent no.2 and the said appeal came to be dismissed by order dated 1.12.2003 of the learned First Additional Sessions Judge, Panaji.

4. The First informant was examined in the said case on or about 24.1.1997, and prior to that on 14.10.1996, she had filed an application for the return of the gold ornaments (Mo. 1 to 6) as well as the gold pieces (Mo.7 to 14) which was disposed off by order dated 15.10.1996, by the learned J.M.F.C., observing that the property would be returned only after proper inquiry. On 10.3.1998, the first informant filed another application which was disposed of by order dated 17.8.1998, observing that the same would be disposed of after inquiry for which the accused as well as the petitioner were required to remain present. On receipt of the notice of the first informant's application dated 10.3.1998, the petitioner filed an application dated 25.9.1998, claiming the said gold ornaments, stating that, the same were forcibly taken from him, after assault and threatening to arrest him.

5. By judgment dated 16.10.2004 in Criminal Revision Application

no.2/2004, this Court ordered an inquiry to be held in the rival claims of the petitioner and the first informant by giving an opportunity to the petitioner (who was examined as PW5 in said criminal case) and to the first informant (who was examined as PW1) and decide which of them was entitled to the possession of the said gold pieces (i.e. to say MO. 7 to 14).

6. In the inquiry which followed, the first informant examined herself (AW1) and produced the recovery panchanama dated 3.10.1996, and in support of the same examined the Investigating Officer Shri Mohandas Naik. She also produced the FIR, and in support of the same, she examined Shri Valaulikar, who had recorded the same. She also produced some other documents. On the other hand, the petitioner examined himself and one Rajesh Naik, who claimed that he was working for the petitioner for the last 11 years on a salary of Rs.2000/-. The petitioner also produced his statement recorded in the course of investigation on 3.10.1996.

7. The learned J.M.F.C. in her order dated 1.7.2005, after going through the evidence recorded in the inquiry, concluded that considering the evidence on record the petitioner was entitled to the possession of Mo. 7 to 14 by the test of preponderance of probabilities. The learned J.M.F.C. also observed that the testimony of RW2/Rajesh Naik supported the version of the petitioner. However, what the learned Magistrate failed to note was that the petitioner in his evidence before the Court on 13.3.2000, when he was examined as PW5, had clearly stated that he had no employees and this fact was reflected in the statement recorded by the

police and which the petitioner himself got produced in the inquiry. This statement reiterated that the petitioner did not have any employees and, therefore, it was clear that petitioner's witness said Rajesh Naik was a got up witness to support a false case. Whether it is the recovery panchanama produced by the first informant or the statement of the petitioner recorded in the course of investigations, the law is well settled, in that there is an unanimity of judicial opinion that a statement of an accused or a witness can be looked into for the disposal of the property, which takes place at the conclusion of inquiry or trial of the case. (See **Oriental Insurance Co. Ltd. V/s State of Karnataka, 1998 Cr. L. J. 2672** relying on **Balkrishna V/s State of Rajasthan, 1984 Cr. L. J. 308, Veerabhadrappa V/s Govindamma, ILR (1973) 23 Mysore 64** and **Thampi Chettiar Arjunan Chettiar V/s State , 1985 Cri. L. J. 1158,** etc.). The Apex Court in the case of ***Khatri V/s State of Bihar (AIR 1981 SC 1068)*** has also held that "the protection under section 162, Cr. P. C. is granted to the accused and that protection is unnecessary in any proceedings other than an inquiry or trial in respect of the offence under investigation and hence the bar created by the section is a limited bar". It has no application, for example in a civil proceedings or in a proceeding under Article 32 or 226 of the Constitution and a statement made before a Police Officer in the course of investigation can be used as evidence in such proceeding, provided it is otherwise relevant under the Evidence Act". The same view appears to have been reiterated in **Mahesh Kumar V/s State of Rajasthan, 1991 SCC (Cri) 219** wherein the Apex Court stated that "It is now accepted principle that the confessional part of the

statement made by the accused leading to discovery within the meaning of section 27 of the Evidence Act, 1872 or section 162 of the Code of Criminal Procedure, 1973 can be made use of for the purpose of the disposal of property under Section 452 of the Code".

8. The learned J.M.F.C. has also relied upon the case of ***Prakash Haldankar V/s Shri Bill Carneiro and others, 1996 (2) Goa L. T. 214*** inspite of the fact that the said case was distinguished in **Prithviraj R. Sardessai V/s State and another (unreported judgment dated 28.10.1996 in Criminal Revision Application no.16 of 1996)** interalia, being sub silentio on section 453 of the Code. The said judgment in the case of *Prakash Haldankar* was clearly inapplicable since it was not the case of the petitioner at all that he was bonafide purchaser of any ornaments sold to him by the accused. In fact it was his case that the melted gold pieces having different weights and totalling to 285 gms was taken from him by the Investigating officer by assaulting him and threatening him that in case he did not give, he would be killed.

9. The learned Additional Sessions Judge came to the conclusion that in the evidence in the inquiry the first informant (AW1) had deposed that Mo.7 to Mo.14 belonged to her as they were melted gold of the remaining gold ornaments which were stolen by the accused from her house and her deposition was corroborated by the deposition of PW2 (P.I. Shri Naik) that during interrogation of the accused, he had disclosed to have sold some gold ornaments to one jeweller at Bicholim and at the instance of the accused Felix Fernandes, the melted gold was recovered from the

goldsmith Prakash Vernekar. The learned Additional Sessions Judge also observed that the petitioner (RW1) had admitted in his cross-examination that he did not lodge any complaint to the superior officers of Police Inspector Shri Naik who had mishandled him. The learned Additional Sessions Judge, therefore, found petitioner's version that he had handed over the gold bars to the police under threats did not appear to be truthful and, therefore, proceeded to hold that it is first informant who was entitled to, for the return of the gold pieces, by giving an indemnity bond.

10. Shri Lotlikar, the learned Senior Counsel submits that there was no evidence produced in the inquiry to co-relate that the gold pieces seized from the petitioner were from the gold ornaments stolen from the possession of the first informant. Learned Counsel further submits that the first informant had not given the description nor weight of gold ornaments stolen from her possession. Shri Lotlikar, therefore, submits that since the gold pieces were seized from the possession of the petitioner they ought to be returned to him. On the other hand, Shri Sardessai, the learned Counsel on behalf of the first informant submits that the petitioner, in case his version was true, would certainly have complained regarding the high handed action of the Investigating Officer, to his immediate superiors and the very fact that the petitioner filed an application only in the year 1998 claiming the said gold pieces shows that the wisdom on him dawned rather late. Shri Sardessai further submits that there is no direct evidence on either side to show that the gold pieces were of the ornaments stolen by the accused or they were made from the four bangles (gonds)

belonging to the petitioner as claimed by the petitioner. Shri Sardessai further submits that the petitioner was in a better position to prove the existence of said bangles with the various books he had produced and that in fact it is the petitioner who has not proved positively by producing best evidence that the melted gold pieces were from the said bangles belonging to him.

11. Chapter 34 of the Code of Criminal Procedure, 1973 (Code, for short) deals with the disposal of the property. Section 457 deals with the procedure to be followed by a Magistrate upon seizure of the property and sub-section (1) thereof provides that whenever the seizure of property by any police officer is reported to a Magistrate under the provisions of this Code, and such property is not produced before a Criminal Court during an inquiry or trial, the Magistrate may make such order as he thinks fit respecting the disposal of such property or the delivery of such property to the person entitled to the possession thereof, or if such person cannot be ascertained, respecting the custody and production of such property. Section 451 deals with the disposal of the property pending trial in certain cases and it, inter-alia, provides that when any property is produced before any Criminal Court during an inquiry or trial, the Court may make such order as it thinks fit for the proper custody of such property pending the conclusion of the inquiry or trial, and, if the property is subject to speedy and natural decay, or if it is otherwise expedient so to do, the Court may, after recording such evidence as it thinks necessary, order it to be sold or otherwise disposed of. Section 452 deals with the disposal of property at

the conclusion of the trial and sub-section (1) thereof provides that when an inquiry or trial in any Criminal Court is concluded, the Court may make such order as it thinks fit for the disposal, by destruction, confiscation or delivery to any person claiming to be entitled to possession thereof or otherwise, of any property or document produced before it or in its custody, or regarding which any offence appears to have been committed, or which has been used for the commission of any offence.

12. Section 410 of the Indian Penal Code defines stolen property. It states that the property, the possession whereof has been transferred by theft, or by extortion, or by robbery, and property which has been criminally misappropriated or in respect of which criminal breach of trust has been committed, is designated as “stolen property”, whether the transfer has been made, or the misappropriation or breach of trust has been committed, within or without India. But, if such property subsequently comes into the possession of a person legally entitled to the possession thereof, it then ceases to be stolen property. Sub-section (5) of Section 452 of the Code provides that in this section, the term “property” includes, in the case of property regarding which an offence appears to have been committed, not only such property as has been originally in the possession or under the control of any party, but also any property into or for which the same may have been converted or exchanged, and anything acquired by such conversion or exchange, whether immediately or otherwise.

13. As per the prosecution, the gold pieces (Mo.7 to 14) were

converted by the petitioner into gold pieces after receiving the ornaments from the accused Felix Fernandes and belonging to the said first informant. It was certainly not the case of the petitioner that he was a bonafide purchaser of the said ornaments. On the contrary it was his case that the said ornaments were forcibly taken from him by the Police Inspector Shri Naik, by threats etc.. Admittedly, a Criminal Court does not decide the title to the property claimed but is required to see as to who is entitled to the possession of the same. As observed by this Court in the case of *Prithviraj R. Sardessai* (supra), a perusal of the three sections show that under sections 451 and 457 the custody is interim whereas under section 452 it is subsequent to the conclusion of the trial. In other words as far as Criminal Court is concerned, a decision under section 452 of the Code is final subject to an appeal or revision that may be filed. This Court also observed that section 452 will have to be borne in mind while passing an order both under section 451 as well as under section 457. That it is also the view held by this Court in the case of **Julio @ Francis K. Bugde V/s State and Anr., 2007 (3) AIR Bom R 238.** As observed by the Apex Court in the case of ***N. Madhavan V/s State of Kerala, AIR 1979 SC 1829,*** as a normal rule after an inquiry or trial when the accused is discharged or acquitted the Court ought to restore the property from the person from whose custody it was taken and in a case of conviction, as observed in the case of *Prithviraj R. Sardessai* it is the person from whose possession it was stolen, who would be entitled to its possession when the property seized is referable to such stolen property.

14. The first informant had produced sufficient evidence to correlate that the seized articles (Mo7 to Mo 14) were from the gold ornaments stolen from her. In the inquiry the first informant had stated that gold in melted form comprises of eight bars (pieces) of 235 gms. in weight which belonged to her as they were melted gold of the remaining gold ornaments which were stolen by the accused from her house and that she was told by the police that the accused had sold the gold ornaments to the jeweler by name Prakash Vernekar who had purchased the same from the accused and it is the police through whom she had come to know about said information. Obviously, the first informant would not have known what had transpired after the theft except through the investigations carried out by the police. She had subsequently admitted, contrary to what she had earlier stated, that she was not present at the time when the said recovery was made. Although the learned Magistrate at the time of convicting the accused observed that Shri Lotlikar, PW2 had not supported the panchanama, the fact remains that Lotlikar/PW2 had partly supported the prosecution version by stating that the accused had disclosed that he had sold the gold ornaments to one goldsmith at Bicholim and had volunteered to show the shop of said goldsmith and after going to Bicholim market had pointed out to the said shop and the owner was present. The recovery panchanama was duly supported by the I.O. The Petitioner had conceded that he had nothing against the I.O. or any other police officer. There is a presumption that the I.O. had recovered Mo.7 to 14 is discharge of official duties. The presence of Lotlikar/PW2 alongwith other panch witness Shri Kalangutkar was also admitted by the petitioner when he was examined as

PW5. In his statement produced, dated 3.10.1996, all that petitioner had stated was that the police party had come alongwith panch and one person by name Felix Fernandes who had informed the police that he had purchased the gold ornaments from him in July 1995, and that total weight of gold then sold to him was about 235 gms. and all that the Petitioner had stated was that he did not remember whether he had sold the gold ornaments to him and as he had said to the police, he had given gold in melted form amounting to 235 gms. Admittedly, the petitioner was no ordinary goldsmith. He was a graduate and a Bank Manager and had the investigating officer done anything to him as belatedly alleged by him, he would have certainly complained about the conduct of the investigation Officer to his superior. He would easily not part with the melted gold (Mo 7 to Mo 14). His silence for over two years speaks eloquently about the falsity of his claim. Considering the evidence both oral and documentary, the learned Additional Sessions Judge was therefore justified in holding that it is the first informant who was entitled for possession of Mo.7 to Mo.14 i.e. the melted gold ornaments sold by the accused Felix Fernandes and purchased by the petitioner.

15. Consequently, I find there is no merit in this revision. The same is hereby dismissed with costs of Rs.2000/- to be paid to the first informant.

N. A. BRITTO, J.

*rp.